No. 82-2011

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARC RICH & CO. A.G., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that there were sufficient contacts to warrant the district court's exercise of personal jurisdiction to enforce obedience to a grand jury subpoena issued to petitioner in connection with the grand jury's investigation of a federal income tax evasion scheme involving petitioner and its wholly-owned New York-based subsidiary.

2. Whether the courts below correctly concluded that the government made a sufficient factual showing to support the exercise of personal jurisdiction over petitioner.

3. Whether the courts below abused their discretion in permitting in camera evidence submitted by the government in connection with petitioner's motion to quash the grand jury subpoena.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not yet reported. The opinion of the district court (Pet. App. 15a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983. A petition for rehearing was denied on June 7, 1983. The petition for a writ of certiorari was filed on June 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury sitting in the Southern District of New York is investigating the possibility of a massive income tax fraud scheme involving petitioner (a Swiss corporation based in Switzerland), its wholly-owned New York-based subsidiary, Marc Rich & Co. International, Ltd. ("International"), and the principals of the two companies. On April 15, 1982, petitioner received a grand jury subpoena duces tecum calling for production of various business records relating to crude oil transactions engaged in by petitioner during 1980 and 1981. The government believes those transactions to be part of a scheme to divert the subsidiary's taxable income offshore to petitioner. On June 9, 1982, petitioner moved to quash the grand jury subpoena, arguing that the court lacked in personam jurisdiction because petitioner was not "doing business" in the United States at the time it was served with the subpoena.[1] The government contended that petitioner was indeed doing business in the United States and that, in any event, it had engaged in crude oil transactions with its United States-based subsidiary and with other United States companies and that personal jurisdiction could be exercised because it was those United States-related transactions that were the subject of the grand jury investigation. See Pet. App. 2a-3a, 16a-20a, 26a.

The district court denied petitioner's motion to quash the grand jury subpoena (Pet. App. 15a-29a). The district court stated that it could not determine

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[1] Petitioner also contended that a Swiss statute barred it from producing the documents called for by the subpoena. The district court rejected that contention (Pet. App. 27a-29a), and petitioner did not raise it in the court of appeals.

from affidavits alone whether petitioner could be said to have been "doing business" in the United States through its subsidiary at the time it was served with the subpoena (*id.* at 22a-25a). However, the district court found that the government had shown that petitioner had sufficient contacts with the United States to justify the exercise of in personam jurisdiction under a "transacting business" test, since there was a basis for believing that petitioner's New York-based subsidiary had engaged in certain transactions on petitioner's behalf in New York (*id.* at 26a-27a). Despite the district court's ruling, petitioner refused to produce the documents called for by the subpoena, and on September 13, 1982, it was adjudged to be in civil contempt (*id.* at 33a-34a). The district court imposed a fine of $50,000 per day, which was stayed pending resolution of an expedited appeal (*id.* at 34a).

A unanimous panel of the court of appeals affirmed (Pet. App. 1a-13a). Although it disagreed with the district court's analysis in several respects,[2] the court of appeals concluded that the district court had reached the correct result. The court of appeals noted that the investigative power of the grand jury is broad and that Congress had made clear that the federal income tax laws apply to foreign corporations (*id.* at 3a-4a). The court concluded (*id.* at 6a-8a) that petitioner had sufficient contacts with the United States to warrant the exercise of in personam

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[2] The court of appeals concluded that the district court should have looked to federal law rather than state law to determine the power of federal courts with respect to enforcement of federal criminal laws (Pet. App. 6a-7a), and that the district court had erred in its allocation of the burden of proof (*id.* at 9a-10a).

jurisdiction in this case, citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), as the "lodestar" of its analysis. The court noted, *inter alia*, that petitioner's alleged violation of federal tax laws involved cooperation with its New York-based subsidiary; that two of the members of the boards of directors of both petitioner and its subsidiary were residents of the United States; and that some of the conspiratorial acts were alleged to have occurred in the United States. Pet. App. 7a-8a.

Petitioner filed a motion for rehearing en banc, which was denied on June 7, 1983. On May 24, 1983, the court of appeals, over the government's opposition, granted petitioner's motion for a stay of mandate pending filing and determination of a petition for a writ of certiorari. See Pet. 2 n.2.

ARGUMENT

Contrary to petitioner's suggestion, the unanimous conclusion of the district court and the court of appeals that exercise of in personam jurisdiction over petitioner is appropriate in the circumstances of this case is clearly consistent with the well-established principles of in personam jurisdiction established by this Court's cases. Petitioner is unable to demonstrate that the decisions below conflict with any decision of this Court or of any other court of appeals (see Pet. 9), and we are aware of no such conflict. Further review in this case, in which the grand jury has been denied petitioner's evidence for more than 14 months, would be particularly inappropriate and would serve only to prolong the frustration of the grand jury's legitimate investigative activities.

1. Petitioner contends (Pet. 9-15) that the result reached by the courts below creates a "startling new

doctrine departing from settled principles limiting federal criminal process." But here the grand jury was investigating a scheme to evade federal taxes involving crude oil transactions between petitioner and its wholly-owned United States-based subsidiary. As the district court observed, "the subject matter of the investigation is related to [petitioner's] contacts with the jurisdiction" (Pet. App. 26a-27a). There is nothing novel or startling about the proposition that a corporation's transaction of business in a state, resulting in significant adverse consequences within the state, is a sufficient basis for in personam jurisdiction over that corporation as to a matter arising out of that very transaction. As the court of appeals recognized (*id.* at 7a), this Court's decision in *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), is the "lodestar" for this precept. In *McGee* the Court concluded that a California court's exercise of jurisdiction over a Texas corporation on a cause of action arising out of an insurance contract that had a substantial connection with California was consistent with the requirements of due process. The contract had been delivered in California, the premiums were mailed from there, and the insured was a resident of California when he died; in addition, California had a clear interest in providing redress for its residents. *Id.* at 223. See also *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-294 (1980); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 317-319 (1945).

Petitioner does not deny that it engaged in the crude oil transactions the grand jury is investigating and that are alleged to have resulted in evasion of federal income tax. Nor does it deny that its contacts with the United States are sufficient to meet the due process requisites of in personam jurisdiction. Those

contacts include petitioner's cooperation with its United States-based subsidiary in connection with the alleged violation, residence of two of petitioner's five directors (at least one of whom is alleged to have been directly involved in the scheme under investigation) in the United States, and occurrence of some of the alleged conspiratorial acts in the United States (Pet. App. 7a-8a). The court of appeals concluded that the affidavits submitted by the government showed that it was likely that petitioner and its United States-based subsidiary had engaged in unlawful tax manipulation (*id.* at 12a); the district court found that the government had shown a basis for believing that petitioner's United States-based subsidiary had engaged in particular crude oil transactions on petitioner's behalf (*id.* at 27a). Both courts concluded (*id.* at 12a, 27a) that the government had made a sufficient demonstration of contacts to satisfy the due process standard of *International Shoe Co.* v. *Washington*, *supra*.

Petitioner protests, however, that the principles of in personam jurisdiction set out in this Court's decisions and applied by the courts below apply only when there is a long-arm statute in existence, when the matter is civil in nature, and when the court is exercising adjudicatory jurisdiction as opposed to enforcement of compulsory process (Pet. 9). Petitioner cites no authority for these supposed limitations, which neatly exclude its own case from coverage.

The limitations petitioner posits are wholly inconsistent with this Court's recognition of the broad investigative authority of the grand jury. The grand jury's "investigative power must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra*, 414 U.S. 338, 344 (1974). See also *United States* v. *Mandujano*, 425 U.S. 564, 571-572 (1976) (plurality opinion); *Branzburg* v.

Hayes, 408 U.S. 665, 688 (1972). There is undoubtedly a strong public interest in having the grand jury investigate the sorts of allegations of income tax fraud that have been made here. The law does not require that the government prove such allegations before the grand jury has had an opportunity to investigate them. So long as there is a basis for believing that the alleged tax fraud conspiracy has occurred, as the courts below found here, the grand jury must be allowed to proceed with its investigation.

The suggestion that Congress was required to enact a special federal long-arm statute before the grand jury, an arm of the court, could exercise the full scope of the personal jurisdiction permitted by the Due Process Clause is insubstantial. Indeed, petitioner's theory would lead to a particularly anomalous result: a court could exercise jurisdiction over petitioner to enforce the production of the documents at issue in the course of discovery in a civil suit against petitioner, but it would have no jurisdiction to require production of those same documents in response to a grand jury subpoena focusing on possible criminal violations of the federal tax laws. In petitioner's view, a foreign corporation could engage with impunity in any number of transactions involving the United States and resulting in violation of its laws, simply by withdrawing from the United States when a grand jury was convened to investigate those transactions. That result is simply inconsistent with common sense, as well as accepted principles underlying the grand jury's investigative authority.

Similarly without basis is petitioner's contention (Pet. 10-14) that the exercise of personal jurisdiction here would lead to unprecedented extension of jurisdiction over individuals outside the United States, as well as erosion of the law of extradition. The courts

below relied on a well-established basis for personal jurisdiction over corporations—transaction of business, having a substantial adverse effect, within the territorial jurisdiction of the court. The decisions below do not in any way threaten to eliminate the need to establish sufficient personal contacts with individuals, or do away with the need for effective service of process or extradition procedures. Nor is the exercise of jurisdiction in this case contrary to the jurisdictional principles with which alien corporations are familiar. Contrast, *e.g.*, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, cert. granted, No. 82-1127 (Mar. 7, 1983) (presenting the question whether a non-resident corporation's purchases of goods in the forum state constitute sufficient contacts to warrant the exercise of in personam jurisdiction over the non-resident corporation on a cause of action unrelated to the purchases).

Petitioner's suggestion (Pet. 15) that this case involves "extraterritorial extension of federal criminal process" is incorrect. The subpoena at issue here was served in this country and sought records related to transactions with companies doing business in the United States that had the effect of evasion of federal income taxes. Production pursuant to the subpoena would take place in this country. Thus, the government of the United States has not attempted to exercise jurisdiction outside its own territory. In addition, petitioner's invocation of foreign policy considerations is misplaced in a case in which the Executive Branch has expressed no concern and is itself seeking to enforce the subpoena. See *United States* v. *First National City Bank*, 379 U.S. 378, 384-385 (1965). Nor has Switzerland stepped forward to voice any concern about this case (see Pet. App. 29a), and petitioner has not identified any legitimate Swiss interest

in restricting the grand jury's access to information concerning United States tax obligations.[3]

Petitioner suggests (Pet. 12-15) that the district court's exercise of in personam jurisdiction is somehow limited by the existence of Fed. R. Crim. P. 17 (e) (2) and 28 U.S.C. 1783, which govern the method of service of a subpoena on United States nationals or residents who are "in a foreign country." As the court of appeals noted (Pet. App. 9a), this case does not involve service in a foreign country. Here service was effected in the United States, and petitioner does not challenge the manner of service (Pet. 14; Pet. App. 8a n.1).[4] Fed. R. Crim. P. 17(e)(2) and Section 1783 have nothing to do with the limits of personal jurisdiction in such a case. See *In re Arawak Trust Co. (Cayman) Ltd.*, 489 F. Supp. 162 (E.D. N.Y. 1980).

The cases petitioner cites for the proposition that a foreign party not found in the United States is beyond the reach of grand jury process (Pet. 10) are inapposite.[5] However, a case petitioner cites in its

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[3] Compare, *e.g.*, *In re Grand Jury Proceedings*, 691 F.2d 1384, 1391 (11th Cir. 1982), cert. denied, No. 82-1531 (June 13, 1983).

[4] Throughout the petition there are references to the ability of a court to bring an alien within its power and the ability to serve process on an alien. However, such statements go to the validity of service of process, not the existence of contacts sufficient to support the exercise of personal jurisdiction. Of course, there may be situations in which there are sufficient contacts to warrant the exercise of personal jurisdiction, but service of process on the non-resident alien cannot be effected. That is not this case.

[5] In *United States* v. *Germann*, 370 F.2d 1019 (2d Cir.), vacated on other grounds, 389 U.S. 329 (1967), and *In re Grand Jury Proceedings*, 532 F.2d 404 (5th Cir.), cert. de-

discussion of international relations (*id.* at 15) suggests that exercise of personal jurisdiction is appropriate in this case. In *In re Arawak Trust Co. (Cayman) Ltd., supra*, the court concluded that its personal jurisdiction did not extend to a Cayman Islands corporation in a situation in which "[t]he government does not claim that Arawak is a target of the grand jury investigation or that any act by Arawak has violated the United States criminal laws." 489 F. Supp. at 165. Here, in contrast, the government does claim that petitioner's transactions involved violation of federal criminal laws, and it is petitioner's contacts with the United States that are the focus of the grand jury's investigation. Petitioner's inability to locate cases supporting its contentions suggests that few other corporations have thought it worthwhile to challenge application of the well-established principles of personal jurisdiction on which the courts below relied.

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nied, 429 U.S. 940 (1976), the courts upheld findings of contempt against non-resident alien individuals who were served with subpoenas in the United States and who failed to appear before the grand jury. In *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960), the court declined to enforce subpoenas for records held by Canadian banks in a case in which such production might have violated Canadian statutes. The Second Circuit has since receded from its position in *Ings* that principles of international comity preclude enforcement of a subpoena that would require the production of documents located in a foreign country. See *United States* v. *First National City Bank*, 396 F.2d 897, 901-905 (2d Cir. 1968). In *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013, 1019 (S.D.N.Y. 1947), decided before many of this Court's modern cases involving personal jurisdiction, the court focused only on the question of whether a Canadian bank was doing business in the United States and concluded that it was.

2. Petitioner further contends (Pet. 16-17) that the court of appeals erred in concluding that the government was required to show a "reasonable probability" that it would be able to establish facts supporting personal jurisdiction in order to justify enforcement of the subpoena. However, petitioner does not suggest what standard it would have preferred. Obviously it would be inappropriate to require the government at this stage to establish beyond a reasonable doubt that the alleged offense the grand jury is investigating had been committed. Indeed, it may well be that the very documents petitioner has withheld from the grand jury for over 14 months constitute the evidence that would prove decisively the contacts necessary to establish in personam jurisdiction. As in the case of a civil suit,[6] a court should not require definitive proof of facts supporting personal jurisdiction before allowing an opportunity to conduct discovery to establish the relevant facts. Otherwise, the grand jury's investigation would be cut short before it begins. In cases like this one, in which the government has presented evidence sufficient to establish a reasonable basis for believing that transactions involving the United States and resulting in violation of its laws took place, the grand jury must be permitted to proceed with its investigation of those transactions.

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[6] Civil plaintiffs are not required to make more than a prima facie showing of a basis for exercise of in personam jurisdiction in order to avoid dismissal at an early stage. They are permitted to engage in extensive discovery on the issue of jurisdiction prior to being required to prove it by a preponderance of the evidence. See, *e.g.*, *Lehigh Valley Industries, Inc.* v. *Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975); *United States* v. *Montreal Trust Co.*, 358 F.2d 239, 242 (2d Cir.), cert. denied, 384 U.S. 919 (1966).

3. Petitioner objects finally (Pet. 18-19) to the fact that the courts below relied in part on in camera evidence as the basis for the conclusion that the government had made a sufficient showing to support the exercise of personal jurisdiction. In the district court the government submitted an ex parte affidavit by an agent of the Federal Bureau of Investigation detailing the history of the grand jury investigation and the existence of an elaborate tax evasion scheme whereby petitioner's United States-based subsidiary diverted millions of dollars of taxable income offshore to petitioner (Pet. App. 19a-20a, 24a).[7] The affidavit explained the government's theory of the case and disclosed the identity and statements of an informant (*ibid.*).

Petitioner contends (Pet. 18) that the court of appeals erred in failing to recognize that ex parte submissions should be allowed only in "truly extraordinary" situations and "only to the degree really necessary." But the court of appeals expressly noted that in camera submission of affidavits would not be routinely accepted; it recognized, however, that this case involves an ongoing interest in grand jury secrecy (Pet. App. 12a). The district court outlined in its opinion the particular considerations it weighed in determining that use of the in camera evidence was appropriate, including the facts that the government had revealed the contents of the in camera affidavit in a general manner, so that petitioner had an opportunity to rebut them, and that the need for secrecy ap-

[7] The affidavit was offered in part to rebut assertions in affidavits submitted by petitioner that it did not conduct any business in the United States market and that its United States-based subsidiary International did not act as its agent. See Pet. App. 17a-20a.

peared to be "genuinely invoked" (*id.* at 24a). The decision that the circumstances justified an exception to the general rule in this case was a matter within the discretion of the courts below. In view of the ongoing grand jury proceedings, the fact that the affidavits revealed both the theory of the government's case and the identity and statements of a government informant, and the fact that petitioner was made generally aware of the information on which the courts below relied, the decision to permit the in camera material was not an abuse of discretion and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1983

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